No. 83-1627

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARSHALL P. SAFIR,
Petitioner,

v.

ELIZABETH H. DOLE
in her representative capacity as
Secretary of Transportation,
Federal Respondent
and
LYKES BROS. STEAMSHIP CO. INC.
UNITED STATES LINES INC.
AMERICAN PRESIDENT LINES LTD.
FARRELL LINES INC.
MOORE McCORMACK LINES INC.
PRUDENTIAL LINES INC.
PRUDENTIAL-GRACE LINES INC.
Carrier Respondents.

REPLY TO RESPONDENTS OPPOSITION TO PETITION FOR CERTIORARI

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May 2, 1984

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MARSHALL P. SAFIR,

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v.

ELIZABETH H. DOLE,
as Secretary of Transportation, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO RESPONDENTS OPPOSITION TO PETITION FOR CERTIORARI

Respondents would circumvent the bar of Rule 21.1 of this Court which states that only the questions raised in the petition or fairly included therein will be considered by the Court. The question that the respondents would raise with all the trappings of a pseudo-cross petition is irrelevant in light of the judgment on the merits against all the violators - those who are the respondents here and those who remain mute. Mills v. Electric Auto-Lite Company et al. 396 US 375,382 Ft. Note 4. (1970)

The maneuver magnifies the weakness of their position. Respondents would assay diversion from the gravamen of this petition, Safir's standing based on his personal monetary stake as a creditor with a judgment not contingent as to liability against these carriers, to that which would request this Court to consider relitigation of factual questions no longer relevant to this petition now that the administrative judgment mandated by the Second Circuit has been affirmed against them in the D.C. Circuit.

The respondents continue to refuse to accept the fact that they can no longer avail themselves of the defenses they interposed in both Circuits in Safir I and IV and in this Court in American Export et al v. Safir 400 US 942 (1970) on the jurisdictional standing issue in the first action. See Restatement of Judgments Second Sec. 18 (2) and its relation to Sec. 26 thereof.

The private action issue was clearly raised in the Court below.

It was first addressed in Dole II in "Safir's Opposition to the Motion of Appellee Dole to Dismiss or in the Alternative for Summary Judgment" See Supplemental Appendix hereto pages 1 through 7. It was next addressed in the petition for rehearing in Dole II. The presentment of this entry in the record below removes the foundation beneath the respondents' argument that the private right of action was not raised before the Court of Appeals. Petitioner stated on Nov. 7, 1983:

"Safir's standing as a competitor in Dole I (Docket 81-2271) and its extinguishment in that appeal is irrelevant to this appeal. He has a monetary stake as a creditor in the assets of the violators and he stands to be injured by any actions the Secretary may take which discriminates against that stake. This is a legally protected interest. His standing here is no longer contingent on esoteric speculations of his competitive viability - nor his psychic motivation" See Supp. appendix p. 6, 7.

In the Petition for Rehearing in Dole II filed on Dec. 12, 1983, Safir stated:

"He (Safir) respectfully submits there was error in the Order of Nov. 28, 1983 (A-27,28) because the panel equated his lack of standing to compel a Dept. of Transportation subsidy recovery in its behalf with a lack of standing to protect his own claims based on private causes of action filed in the bankruptcy court for disgorgement and restitution from the violator Lykes and other ocean shipping companies.

The protection of his own claims against the new discriminatory conduct by the federal appellee is separate and discrete. The finding of lack of standing in Dole I --- is irrelevant to his standing in Dole II once the judgment as to violation of Sec. 810 and the principle of retroactive recovery of unjust enrichment (illegal subsidy payments) was affirmed against Lykes and the others..."

The issue, therefore, was raised below. Whether the Court of Appeals was in error by

rejecting the changed circumstances that its own affirmation of the Second Circuit mandated judgment for liability and recovery had created is fairly included in the second question in the petition.

Respondents further contend these private actions are barred because petitioner's contentions were not raised in either the agency or the district court. This has been answered in Sec. 26 (1)(c) of the Restatement by the inability of the prevailing plaintiff to rely on any one certain theory of the case until the judgmatical involvement of the executive branch was at an end. (See Supp. Appendix p. 4). That involvement, both judgmatical and participatory as to further proceeds in the disgorgement has reached final repose with the waiver by the Solicitor General of April 12, 1984 to this petition.

Contrary to the contention of respondents, petitioner is not asking the Court to decide whether Sec. 810 confers a private right to

enforce government claims for refund of subsidy or to have such refunds turned over to him. His private right to such enforcement was decided in Safir I and reaffirmed in Safir IV. Nor is he asking to have "public money refunds" turned over to him.

Petitioner's claim under restitutionary law is for the disgorgement of illegal earnings made possible by the increased revenues these public moneys generated for the violators at his expense. There are two statements in respondents' opposition with which, if qualified, petitioner can agree.

1."The statute confers no private right to public money". 2. "All the proceedings below stemmed from the second provision, viz. that no subsidy shall be paid to a violator."(See respondents' opposition page 8). First, the statute confers no right to public money on a contractor who violates its proscription. Second, that this is the true meaning of "no subsidy shall be paid".

The statute implies a private right of action for rescission or injunction where the government refuses to assist in the victim's behalf and where the recovery of earnings from subsidy when "disbursed as earned" were used to burden and destroy him. See Safir v. Gibson 330 F. Supp. 225,226,227. (DCEDNY 1971).[1]

Ft. Note 1 Respondents' ft. note 12 cites petitioner's complaint in his review action DDC74-1474 as to its silence regarding restitution. Petitioner would point to their own silence on illegal enrichment when their own complaint 74-1788, par. 19(d) (consolidated therewith) considered it unconscionable for the government to demand "refund of past earned subsidies".

Petitioner prays that the Court will not be "chary" of reading the Savings Clause of the Ocean Shipping Act of 1984 Pub.L. No. 98-237, 98 Stat 67, as other than approving new causes of action for prior misconduct for one year from the date of enactment. See Transamerica Mtge. Advisors v. Lewis 444 US 11, 18-19 (1979). Contrary to respondents' contention Sec. 810 will not soon be inoperative unless the year 1998 can be conceived to be "soon". The present contracts of the violator Lykes expires in that year - that of American President Lines Ltd. expires Dec. 31, 1997. The operating differential subsidy appropriation for that contract obligation is not being wound up and the construction differential subsidy appropriation merely languishes in the fiscal uncertainty created by the present tax revenue shortfall. Section 810 will remain to deter recurring predatory tactics by these carriers now that this petitioner has been successful in convincing the Congress to retain it as a deterrent against

destruction of innovative American enterprise. When respondents would write off the relationship between Sec. 810 and the F.M.C. regulation of the Shipping Act of 1984, the words of George Santayana come to mind "Those who cannot remember the past are condemned to repeat it" cf. Safir v. Gibson 432 F2d 137,145 (DC Cir. 1970) cert denied 400 US 850.

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

Marshall P. Safir

Dated: May 7, 1984

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MARSHALL P. SAFIR,

Appellant,

v.

ELIZABETH H. DOLE,
SECRETARY OF TRANSPORTATION,

and

LYKES BROS. STEAMSHIP CO., INC.

Appellees.

RECEIVED
Nov. 7, 1983
Clerk of the
United States
Court of Appeals

CIVIL ACTION
No. 83-1798

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Safir's Opposition to Motion by Appellee Dole
To Dismiss the Appeal or In the Alternative
for Summary Affirmance

On Sept. 30, 1983 this Court affirmed an administrative judgment filed by the Secretary of Commerce in 1974 which held that 8 steamship lines had violated Sec. 810 of the MMA '36. (46 USC 1227). See Safir v. Dole Slip Opinion F2d - 1983 (Dole I).

The Court in so doing followed the prior Second Circuit holding which collaterally estopped the appellant ship lines from relitigating

the issue of their liability for disgorgement of illegal subsidy payments made prior to the determination of the violation.

By vacating the judgment of the district court in Safir v. Klutznick 526 F. Supp 921 (1981) and that Court's remand order to the Secretary of Transportation, and instead reaching back to reject the appellant-ship lines attack on the Secretary's administrative judgment of 1974, this Court overrode ten years of its own orders and opinions as well.

The Court by so doing placed the litigation in the posture it would have been had the Mandate of the Second Circuit in Safir I and II (1969-1970) been followed in this circuit in the intervening years. The Second Circuit remedy for the victim by following the restitution formula of Phelps Dodge v. NLRB (313 US 179,197 (1941) under common law is open and Safir is free at last to pursue these actions. Safir is the prevailing defendant (with the Secretary) in the complaints filed by the "trade lines" in DC DC 74-1788 (1974)

These trade lines include Lykes, Moore McCormack, US Lines and Farrell-American Export. In determining the appeals from this District Court docket on the merits, this circuit left standing Safir as the prevailing party to pursue his second claim for restitution from each violator in either circuit as the major issues are now precluded from collateral attack.

The federal appellee in Dole II (Docket 83-1798) would confuse appellant's standing in Dole I as a potential competitor, with his newly fortified standing in Dole II based on the order and judgment of Sept. 30, 1983. The slip opinion of Sept. 30, 1983, as printed, incorrectly misplaces the "versus" (v.) thereby confusing appellants from appellees. Both Safir and the Secretary are the victorious appellees in Dockets 81-2389, 81-2395 and 82-1008 in Dole I.

The vacation of the Klutznick judgment, which Judge Green held was not a monetary judgment in Safir's favor, with the judgment of this Court in Dole I fortifies the monetary nature of Safir's claim against the violators.

The Dole I affirmation of the findings of violation by the Secretary in 1983 in no way detracts from this court's criticism of the capricious mitigating conduct of the Secretary in rejecting his duty to the victim in Safir v. Kreps 551 F2d 447,455 by his own "purported" monetary settlement. Any dicta in Safir v. Klutznick which might have given Judge Green the impression that the United States was the sole beneficiary of the disgorgements is no longer valid. The private remedy mandated in Safir I p. 978 ft. note 8 can go forward - four of these private actions have already been instituted in the bankruptcy forum against certain of the violators and the action against the Secretary, necessary to protect his position as creditor against any discriminatory actions she may take, is before this panel now.

These second causes of action fit squarely in the exceptions to the general rule concerning "splitting" set forth in Restatement of Judgments Second Sec. 26.

The Rule of Sec. 26 (1)(b) states that part or all of a claim subsists when the Court in the first action has expressly reserved the plaintiff's right to maintain the second action. This is specifically provided in Safir v. Dole (I) - F2d - Slip Opinion page 11:

> "The relief Safir seeks may benefit him --- and the mere threat of the requested relief may benefit him economically --- should the ship lines conclude they would be better off to purchase the resignation of (SAFIR) than to continue the litigation."

Lest the violators take the above quote to apply only to a petition for certiorari in Dole I (Docket 81-2271) let them be disabused by foot note 8 in Safir I.

> "The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme."

Rule 26 (1)(c) addresses the exception for second causes of action wherein the plaintiff was unable to seek such a remedy because of the limitations on the subject matter jurisdiction

of the courts or restrictions on their authority to entertain multiple theories or forms of relief in a single action.

Until the Court in Dole I vacated the judgment in Safir v. Klutznick supra, the interminable morass of relitigation via administrative remand within the structural confines of the Administrative Procedure Act that Safir v. Kreps supra had contoured would have never ended.

Appellant was unable to rely on one certain theory of the case (be it "common fund" or restitution) or to seek one certain remedy or form of relief until the judgmatical involvement of the Secretary was at an end. Safir v. Kreps supra did not offer the District Court multiple theories of "profit" remedies to Safir. "Profit", until the order in Dole I, remained inchoate.

It was only moves in anticipation of the adverse nature of the order in Dole I by the violators that forced this appellant to protect his claim by the filing of the instant action in Dole II.

The approvals granted to Lykes and others under Sec. 608 MMA '36 permitted undisguised fraudulent transfers of assets. If he was not a judgment claimant then, he is now. The dealer in Dole I has replaced a full house with a royal flush.

Dole I not only settles on a higher appellate level the findings of liability of the carriers for disgorgement but now settles the retroactive reach of the recovery scheme once and for all. This comports with the exceptions to the splitting rule under Sec. 26 (1)(c). The order follows the statutory scheme as set forth by its sister circuit in Safir I and Safir II and allows reliance on its new judgment as res judicata in seeking the remedy formulized in Safir I citing Phelps Dodge v. NLRB, 313 US 177,197 (1941) with or without the government as co-complainant in the action for restitution.

The statutory scheme (see Safir I N. 8 quote supra) in Judge Friendly's formula ineluctably requires such new action.

The Rule of Sec. 26 (1)(d) in the Restatement Second states that where "it is the sense of the scheme that the plaintiff should be permitted to split his claim" a second action would lie. It was recognized that the statutory authorization for the Secretary to investigate and conclude that a violation of Sec. 810 occurred would require that common law principles would be necessary to disgorge the moneys long imbedded in the assets of the violators. Restitutionary law is one of those principles.

On the basis of the foregoing it is clearly shown that the policies favoring preclusion of a second cause of action against each of the violators are overcome by the failure of the last ten years of this litigation to yield a coherent disposition to a remedy for the victim. When the second highest court in this land employs a new broom to sweep away a decade of old dicta, one must concede that coherence and precedent might have suffered along the path.

The Order in Safir v. Dole (I) therefore is

a reaffirmation of the efficacy of appellant's claim in Dole II.

It re-establishes Safir as a judgment creditor and it arrives adventitiously to overcome even the non-traditional notions of standing set forth in Valley Forge Christian College v. Americans United 454 US 464,472 and with a pedigree so high as to fend off any attack of those who would use standing to "slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits." Valley Forge v. Americans United supra 490,491. Justice Brennan in dissent citing Barlow v. Collins 397 US 159,178 (1970).

Safir's standing as a competitor in Dole I (Docket 81-2271) and its extinguishment in that appeal is irrelevant to this appeal. He has a monetary stake as a creditor in the assets of the violators and he stands to be injured by any actions the Secretary may take which discriminates against that stake. This is a legally protected interest.

His standing here is no longer contingent on esoteric speculations of his competitive viability - nor on his psychic motivation. Restitutionary satisfaction is not "vengence" (sec). Forensic phillipics lose their effect when mispelled.

Respectfully submitted,

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Dated: May 7, 1984